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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1973

No. 73-1951

CLARENCE OLIN "HEAD" REVEL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ERNEST C. HORNSBY
P.O. Box 606
Tallassee, Alabama 36078

Counsel for Petitioner.

Washington, D.C. • THIEL PRESS • (202) 638-4521

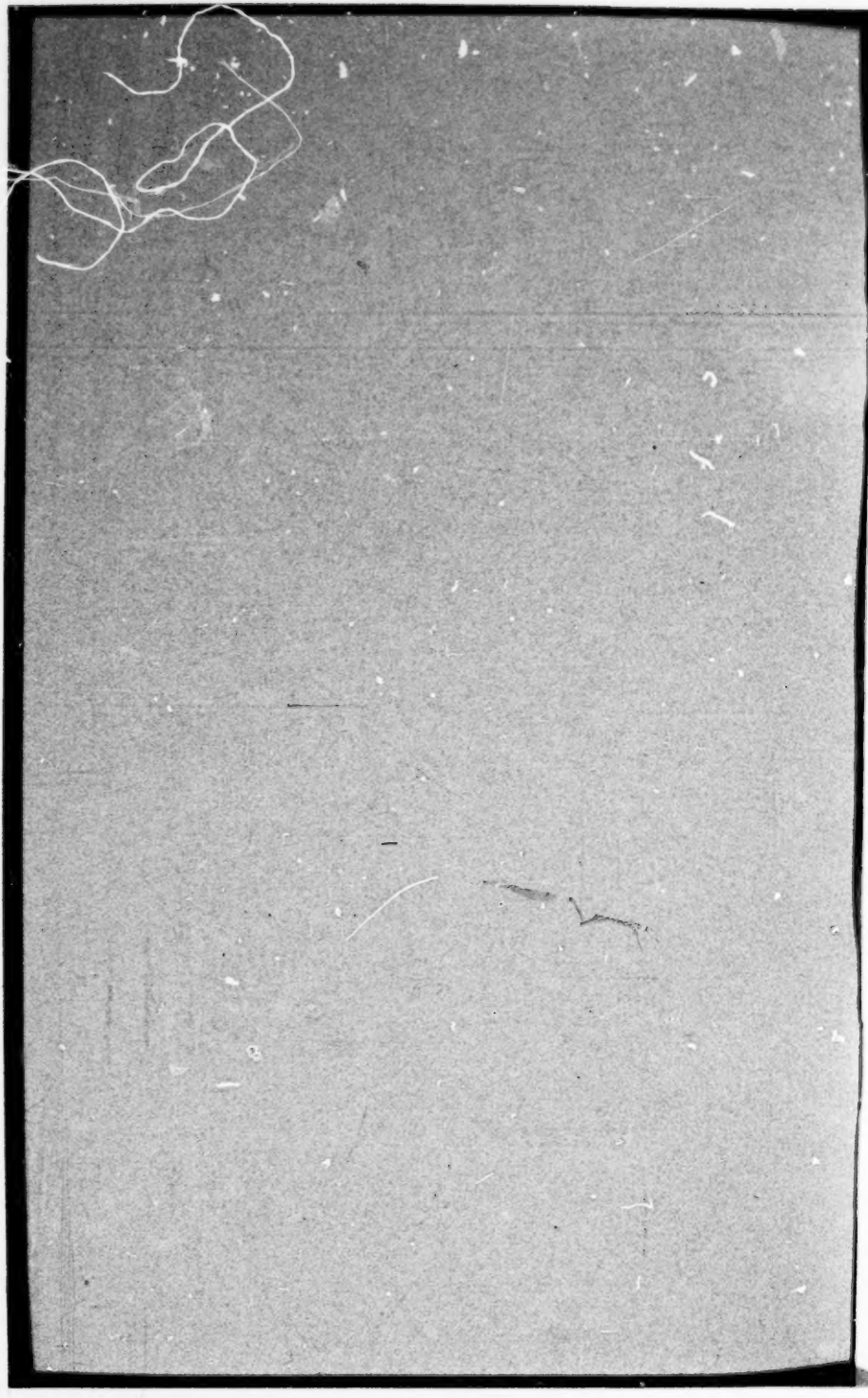

TABLE OF CONTENTS

OPINION BELOW 2
JURISDICTION 2
QUESTIONS PRESENTED 2
STATUTES INVOLVED 3
STATEMENT OF THE CASE 3
REASONS FOR GRANTING THE WRIT
I. It is a Violation of Due Process for a Defendant to be Convicted and Punished for Conspiracy to Violate and the Substantive Violation of 18 USCA 1955 5
II. There Can be no Conviction Under 18 USCA 1955 Where There is no Violation of the State Statute Alleged in the Indictment 6
III. Nine Constitutionally Improper Comments by the United States Attorney During Trial Respecting Defendant's Silence Cannot be Harmless Error Beyond a Reasonable Doubt 11
IV. Where the Trial Judge's Instructions and Rulings Were "Plain Error" and Constituted Substantial Misstatements of the Law to the Facts, Irrespective of Whether the Trial Judge was Biased or Not, the Defendant is Due a New Trial 12
V. A Defendant Cannot be Convicted of the Substantive Violation of 18 USCA 1955 Where There is no Substantial Overt Act of the Defendant Proven in the Jurisdiction of the Court 13
CONCLUSION 13

TABLE OF AUTHORITIES

Cases:

Chapman v. California, 386 U.S. 18 11
Fein v. United States, No. 73-175 5
Gray v. United States, No. 73-231 5
Ianelli v. United States, Docket No. 73-64, 42 Law Week 3652 5
Schneider v. U.S., 459 F.2d 540 (8th Circuit) 1972 9
Thomas v. U.S., 151 F.2d 183. 12
U.S. v. Acquino, 336 F. Supp. 737 9
U.S. v. Bally Mfg. Corp. 345 F. Supp. 410 (1972) 9, 10
U.S. v. Becker, 461 F.2d 230 (2nd Circuit) 8
U.S. v. Cerone, 452 F.2d 274 (7th Circuit) 1971 7
U.S. v. Gibbart, 441 F.2d 1261, cert. denied, 92 Sup. Ct. 23, 382 U.S. 811, 15 Lawyers Edition 2d 96. 7
U.S. v. Hunter, 478 F.2d 1019 (7th Circuit) 8
U.S. v. Nardello, 393 U.S. 286, 89 Sup.Ct. 534 21 Lawyers Edition 487 (1969) 8, 10
U.S. v. Sacco, 337 F. Supp. 521 10
U.S. v. Segal, 341 F.2d 837, cert. denied, 86 Sup. Ct. 23, 382 U.S. 811, 15 Lawyers Edition 2d 60 8
U.S. v. Sharpnack, 355 U.S. 286, 78 Sup. Ct. 291, 2 Lawyers Edition 2d 282 (1958) 9
U.S. v. Smaldone, 485 F.2d 1333 (10th Circuit) 1973 7

Statutes:

United States Constitution, Fifth Amendment 6, 10
18 USCA 371 . . . . . 2, 3
18 USCA 1952 . . . . . 6, 7, 8, 9

18 USCA 1955 ..... *passim*

Title 14, Sections 261 and 278, Code of Alabama, 1940, Recompiled 1958 3

TABLE OF CONTENTS OF APPENDIX

Opinion of Court Below 1a

Order Denying Petition for Rehearing 6a

Order Denying Petition for Stay of Mandate 7a

18 USCA 371 and 18 USCA 1955 ..... 8a

Title 14, Sections 261 and 278, Code of Alabama 1940, Recompiled 1958 ..... 11a

Affidavit of Jerry Evans 12a

Order of District Court Denying Motion for New Trial 15a

Amended Order of District Court 20a

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SUPREME COURT OF THE UNITED STATES

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CLARENCE OLIN "HEAD" REVEL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment herein of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on April 24, 1974, petition for rehearing denied on May 29, 1974.

OPINION BELOW

The opinion of the Court of Appeals is not yet reported. It confirmed the conviction of the Petitioner for the substantive violation of 18 USCA 1955 and conspiracy to violate 18 USCA 1955 as provided in 18 USCA 371. The opinion of the Court of Appeals is set forth in the appendix attached hereto.

JURISDICTION

The judgment of the United States Court of Appeals was entered on April 24, 1974. The petition for rehearing was denied on May 29, 1974. Jurisdiction of this Court is invoked under 28 USCA 1254(1).

QUESTIONS PRESENTED

1. It is a violation of due process for a defendant to be convicted and punished for conspiracy to violate and the substantive violation of 18 USCA 1955.

2. There can be no conviction under 18 USCA 1955 where there is no violation of the state statute alleged in the indictment.

3. Nine Constitutionally improper comments by the United States Attorney during trial respecting defendant's silence cannot be harmless error beyond a reasonable doubt.

4. Where the trial judge's instructions and rulings were "plain error" and constituted substantial misstatements of the law to the facts, irrespective of whether the trial judge was biased or not, the defendant is due a new trial.

5. A defendant cannot be convicted of the substantive violation of 18 USCA 1955 where there is no substantial overt act of the defendant proven in the jurisdiction of the Court.

STATUTES INVOLVED

The statutes involved are 18 USCA 1955 and 371. The Alabama statutes involved are Title 14, Sections 261 and 278, Code of Alabama 1940, Recompiled 1958. Because these statutory provisions are lengthy, their pertinent texts are set forth in the appendix attached hereto.

STATEMENT OF THE CASE

The petitioner was convicted in the United States District Court for the Middle District of Alabama, Eastern Division, of conspiracy to violate and the substantive violation of 18 USCA 1955 on May 19, 1973. Petitioner's conviction was affirmed by the United States Fifth Circuit Court of Appeals on April 24, 1974 and rehearing denied on May 29, 1974. The petitioner's application to stay execution of the mandate pending certiorari was denied by the Fifth Circuit Court of Appeals on June 11, 1974. By order of the United States District Court for the Middle District of Alabama, Eastern Division, the petitioner was committed to the federal penitentiary in Atlanta, Georgia for service of his sentence at 12:00 high noon on Friday, June 21, 1974. The petitioner was sentenced to four years imprisonment.

Petitioner and twelve others were indicted. Count One charged petitioner and twenty-one others with a conspiracy under 18 USCA 371 to violate 18 USCA 1955. Count Two charges petitioner and twelve others with the substantive violation of 18 USCA 1955. Both counts of the indictment charge that the petitioner either conspired to violate or actually violated Title 14, Sections 261 and 278, Code of Alabama 1940, Recompiled 1958.

The government presented testimony from thirty-three witnesses, twenty-seven of whom knew of no connection whatsoever of the petitioner with any illegal gambling

operation involving five or more people and in violation of State law. Because of the inclusion of a conspiracy count the government proved the bulk of its case with the use of hearsay testimony. No witness testified that he or she had personally witnessed the petitioner running, operating, supervising, directing, financing, conducting, managing or owning any part of or all of any football parley operation. There was no evidence of any involvement by petitioner with any straightline betting or bookmaking operation. No evidence was offered showing any substantial overt act involving an illegal football parley operation by petitioner within the State of Alabama. Witness Jerry T. Evans testified that on two occasions he had had several drinks with the petitioner and others in the cocktail lounge of the Holiday Inn in Phenix City, Alabama, where the football parley operation was discussed in petitioner's presence. However, the credibility of Jerry T. Evans' testimony is now under attack as a result of his affidavit stating that his trial testimony concerning the petitioner's involvement in a gambling discussion in the Holiday Inn cocktail lounge in Phenix City was untruthful. A copy of the affidavit of Jerry T. Evans is contained in the appendix attached hereto and a copy of the order of the Federal District Judge in Montgomery, Alabama, respecting the petitioner's motion for new trial based upon untrue trial testimony is also attached hereto in the appendix. Witness Bobby Joe Lee testified that on one occasion he went to the defendant's home in Phenix City at the request of Bobby Smith and picked up some money from the defendant and took the money to Bobby Smith. There was no discussion between the petitioner and Bobby Joe Lee at petitioner's home in Phenix City and no further evidence was offered respecting the money that the petitioner sent by Bobby Joe Lee to Bobby Smith.

The prosecution against the petitioner was commenced by the returning of an indictment against him by the Federal Grand Jury on March 13, 1973. The indictment alleged and the evidence showed that the alleged illegal activity took place between September 1, 1971 and November 25, 1971.

REASONS FOR GRANTING THE WRIT

I.

IT IS A VIOLATION OF DUE PROCESS FOR A DEFENDANT TO BE CONVICTED AND PUNISHED FOR CONSPIRACY TO VIOLATE AND THE SUBSTANTIVE VIOLATION OF 18 USCA 1955.

The United States Supreme Court has granted certiorari on this question in a case styled *Ianelli vs United States*, Docket #73-64, 42 Law Week 3652. It is petitioner's understanding that this question is also presented in *Fein vs United States*, #73-175 (petition for certiorari pending or granted). See also *Gray vs United States*, #73-231 (petition for certiorari pending or granted). The government has not opposed the granting of certiorari in the above cases. The question in the *Ianelli vs United States* case on which certiorari has been granted is framed a little differently but is the same issue as presented in the instant case.

The petitioner herein was indicted, tried and convicted on both a conspiracy count and a substantive violation count respecting 18 USCA 1955. Since this Court has the identical issue before it in the *Ianelli vs United States* and related cases, petitioner does not wish to unduly burden the Court with repetitious arguments, but respectfully draws the Court's attention to petitioners' briefs in those cases.

Whorton's Rule asserts that since concert is necessary to the offense or violation of 18 USCA 1955, a separate count of conspiracy to violate the same section will not lie. There is a split among the circuits as to the application of this rule and it is necessary that the Supreme Court of the United States determine whether or not a conviction of both conspiracy and the substantive violation of 18 USCA 1955 constitutes double jeopardy or is a violation of the due process clause of the Fifth Amendment.

Because the Court has granted certiorari on this question already, the petitioner will not unduly burden this petition with further argument.

II.

THERE CAN BE NO CONVICTION UNDER 18 USCA 1955 WHERE THERE IS NO VIOLATION OF THE STATE STATUTE ALLEGED IN THE INDICTMENT.

The Fifth Circuit Court of Appeals in its opinion concedes that there was no state law violation proven; that petitioner's factual bases for his allegation that the State Statute of Limitations barred State prosecutions for the offense are correct; and that petitioner correctly emphasized the importance of Statutes of Limitations in the criminal law, and the strictness with which the government must comply with them. However, the Fifth Circuit Court incorrectly held that 18 USCA 1955 did not incorporate the state statutes. The Court of Appeals failed to note the distinction between Section 1952 and Section 1955. The facts presented in the case at bar appear to be of first impression insofar as the application of a state statute of limitations to Section 1955 is concerned.

As the law now stands gambling activity conducted in one state may be a federal offense, while the same activity in another state may be sanctioned by the law. *U.S. vs Smaldone*, 485 F2d 1333 (10th Circuit) 1973. If there is no violation of State law there can be no conviction under Section 1955.

In Section 1955 Congress has assimilated by reference the various gambling statutes of the states that prohibit gambling. The violation of State law has been incorporated in Section 1955 and is an element that must be proved in a Section 1955 prosecution. 18 USCA 1952, the so-called "Travel Act," does not incorporate the state law and the violation of state law is not an element that must be proven. There are three elements to be proved in a Section 1952 prosecution: (1) interstate travel; (2) intent to promote, direct or manage an illegal business; (3) an overt act in attempting or participating in the illegal business. *U.S. vs Gibbart*, 441 F2d 1261, certiorari denied 92 Supreme Court 97, 404 US 855, 30 Lawyers Edition 2d 96. Section 1952 punishes the use of facilities in interstate commerce in furtherance of enterprises violative of state statutes; it does not punish substantive violations of state statutes per se. *U.S. vs Cerone*, 452 Fed 274 (7th Circuit, 1971). Furthermore, even the language of Section 1952 is different from that found in Section 1955. Section 1955 expressly states, in part, that the *"illegal gambling business is* a violation of the law of a state or political subdivision in which it is conducted." Section 1952 provides, in part, that "unlawful activity means . . . in violation of the laws of the state in which committed *or of the United States."* Section 1955 is limited to illegal gambling as determined by State law. Section 195 prohibits any unlawful activity whether it is violative of State law or not, if the aforementioned three elements are present and can include blackmail,

extortion, prostitution, narcotics, liquor on which the federal excise tax has not been paid. *U.S. vs Acquino,* 336 F Supp 737.

Interstate activity is an element to be proved under Section 1952. Not so in Section 1955. The Organized Crime Control Act of 1970 which added Section 1955 to Title 18 prohibits those intrastate large scale gambling activities that are in violation of the law of the state in which it is conducted. The State law triggers the operation of Section 1955 whereas, interstate travel triggers Section 1952. There could be no Section 1955 prosecution in Nevada but there could be a valid prosecution under Section 1952 for any unlawful activity that involved interstate activity in Nevada. The "Travel Act" prohibits the clandestine flow of profits and materially assists states in combating pernicious undertakings which cross state lines. *U.S. vs Nardello,* 393 U.S. 286, 89 Supreme Court 534, 21 Lawyers Edition 487 (1969). The reference to State law *and* Federal law in Section 1952 defines the conduct prohibited. The reference to State law *only* in Section 1955 and the purpose of the Organized Crime Control Act of 1970 make the *State* law violation the gravamen of the indictment.

In other cases decided under Section 1955, the appellants have conceded the violation of state law and thus no ruling on the question in point here. *U.S. vs Hunter,* 478 F2d 1019 (7th Circuit); *U.S. vs Becker,* 461 F2d 230 (2nd Circuit). The Organized Crime Control Act of 1970 does not contain a statute of limitations. If Congress intended for a federal statute of limitations to apply, it appears that they could have very easily included one in the act. Gambling per se is not an illegal activity under federal law. *U.S. vs Segal,* 341 F2d 837, certiorari denied 86 Supreme Court 23, 382 US 811, 15 Lawyers Edition 2d 60.

In *Schneider vs U.S.*, 459 F2d 540 (8th Circuit), 1972, the Court discusses "the incorporation of state laws into federal statutes" and the lack of uniformity across the country in connection with an 18 USCA 1955 prosecution.

U.S. vs Acquino, supra, contains the following language in connection with a Section 1955 prosecution: ... this procedure of incorporating by reference state criminal statute in the federal statutes as "a practical accommodation of the mechanics of the legislative functions of state and nation in the field of police power where it is especially appropriate to make federal regulation of local conduct conform to that already established by the state." *U.S. vs Sharpnack*, 355 US 286, 78 Supreme Court 291, 2 Lawyers Edition 2d 282 (1958). In *United States vs Bally Mfg. Corp.*, 345 F. Supp. 410 (1972), the defendants were charged with a violation of both Section 1952 and Section 1955. The defendants contended that there was no violation of the Louisiana anti-gambling statutes. The Court said: This is a threshold question of no small importance as the "unlawful activity" proscribed by Section 1952 and 1955 is described in every count as arising from defendant's violation of Louisiana R.S. Section 14:90. Both Section 1952 and Section 1955 are directed only at gambling enterprises which violate state law and thus it will be encumbent upon the government to prove that the defendants conspired to violate or violated state law. No other state law than La. R.S. Section 14:90 is referred to in any count." *U.S. vs Bally*, supra, also held that the rule is simply that a variation in state laws does not in any way nullify or render unreasonable a federal anti-gambling statute which *incorporates state law* with regard to Section 1955. The Court relied on three other federal cases in reaching the above conclusion: Schneider,

supra, *U.S. vs Sacco*, 337 F Supp. 521 and *U.S. vs Acquino*, supra. The Court further held that what the government must show at a Section 1955 trial is that the elements of Section 1955 are satisfied by these allegedly illegal gambling businesses; that is, there must be a violation of State law (La. R.S. 14:90) . . .

The proof under Section 1952 is not the same as the proof necessary to convict under Section 1955. Both statutes can be used simultaneously in the same indictment against the same gambling business. There is no basis for requiring an election. *U.S. vs Bally*, supra.

In *U.S. vs Sacco*, supra, the Court held that despite the fact that a violation of State law is one element of the federal offense of conducting, financing, managing, supervising, directing or owning all or part of an illegal gambling business, the federal statute is not violative of the fifth amendment, since legislation which constitutes an exercise by Congress of its plenary power over commerce is not repugnant to the due process clause of the fifth amendment merely because of variations in state laws.

The Fifth Circuit cited *U.S. vs Nardello*, supra, however, this case involved the classification of state and federal law (federal extortion vs state blackmail) and the Court concluded that "the inquiry is not the manner in which states classify their criminal prohibitions but whether the particular state involved prohibits the extortionate activity involved."

Both counts in the case at bar cited specific Alabama statutes violated by petitioner. The government simply failed to prove a violation of State law as of the date it commenced its prosecution. Hence this case should be reversed.

III.

NINE CONSTITUTIONALLY IMPROPER COMMENTS BY THE UNITED STATES ATTORNEY DURING TRIAL RESPECTING DEFENDANT'S SILENCE CANNOT BE HARMLESS ERROR BEYOND A REASONABLE DOUBT.

Without dispute the United States Attorney made nine improper comments or references to the petitioner's not taking the witness stand in his own behalf. In his closing argument, the United States Attorney was attacking the petitioner's contention that he was innocently present at the place where the football parley operation was being conducted. The United States Attorney in his argument questioned the lack of testimony respecting whether or not the petitioner was an avid football fan. Two government witnesses testified that the petitioner was an avid football fan. Hence, the United States Attorney's improper comment had to be considered by the jury as a questioning of the petitioner's personal silence. Such a machine gun repetition of a denial of Constitutional rights designed and calculated by the United States Attorney to make the defendant's version of the evidence worthless can no more be considered harmless than introduction against defendant of a coerced confession. *Chapman vs Calif.*, 386 US 18. The burden is on the government to prove that the Constitutional error was harmless beyond a reasonable doubt.

IV.

WHERE THE TRIAL JUDGE'S INSTRUCTIONS AND RULINGS WERE "PLAIN ERROR" AND CONSTITUTED SUBSTANTIAL MISSTATEMENTS OF THE LAW TO THE FACTS, IRRESPECTIVE OF WHETHER THE TRIAL JUDGE WAS BIASED OR NOT, THE DEFENDANT IS DUE A NEW TRIAL.

In charging the jury on the substantive count the Court stated, ". . . and Mr. Revel can have done this by himself . . ." This charge is absolutely erroneous. Further, the Court failed to charge the jury with reference to the substantive count that any affirmative act done by the petitioner must have been done within the State of Alabama in order to give the Court jurisdiction. Under no theory of the government's case and under no applicable law can "Mr. Revel have done this by himself." It takes two to conspire and five to commit a violation of Section 1955. Further, the Court erroneously instructed the jury with regard to the substantive count when he said: "Now, where two or more persons are charged with a commission of a crime, the guilt of any defendant may be established without proof that he personally did every act constituting the offense charged." This charge is plain error as respects this substantive charge under Section 1955. For the petitioner to have been guilty of the substantive violation of 18 USCA 1955, he had to have done some substantial affirmative act himself within the State of Alabama in violation of the Alabama law before he can be convicted of the substantive violation of Section 1955. This the government failed to prove. A defendant has a right to a correct statement of the law from the Courts. *Thomas vs U.S.*, 151 F2d 183.

V.

A DEFENDANT CANNOT BE CONVICTED OF THE SUBSTANTIVE VIOLATION OF 18 USCA 1955 WHERE THERE IS NO SUBSTANTIAL OVERT ACT OF THE DEFENDANT PROVEN IN THE JURISDICTION OF THE COURT.

It is error to submit the count charging the substantive violation of 18 USCA 1955 to the jury where there is no proof that the defendant has violated the Alabama gambling laws charged in the indictment. The defendant committed no substantive violation of 18 USCA 1955 in Alabama. He may or may not have been guilty of a Section 1955 violation in Georgia, but that is not the question before us. He was not being charged with violating the laws of Georgia.

CONCLUSION

The petitioner respectfully submits that Whorton's Rule as applied to 18 USCA 1955 rules out any indictment, conviction, or punishment for conspiracy. With the elimination of the conspiracy count against the petitioner herein, it is certain that the government could not obtain a conviction against the petitioner. Over 90% of the government's evidence against petitioner was hearsay admitted under the so-called co-conspirator exception. Further, the government simply had no evidence of any substantive violation of the Alabama statutes cited in the indictment by the petitioner. It is respectively submitted that Whorton's Rule does apply to Section 1955 prosecutions. Clearly there can be no prosecution under 18 USCA 1955 if there is no violation of State law. There was none in this case. The government cited specific Alabama gambling statutes in its indictment and attempted to prove a violation of same. However, the statute of limitations had already run

before the commencement of the federal prosecution as to the Alabama law violations. Section 1955 incorporates State law and a violation of State law is an element that must be alleged and proved before a conviction can be obtained. This was not done in petitioner's case and hence this conviction must be reversed. The nine Constitutionally improper comments by the United States Attorney during trial and the trial judge's erroneous instructions to the jury when taken together with the fact that there was no substantive overt act in violation of the Alabama gambling statutes proved compel the granting of certiorari by the United States Supreme Court in this case.

Respectfully submitted,

ERNEST C. HORNSBY
P.O. Box 606
Tallassee, Alabama 36078
(205) 283-3533

Counsel for Petitioner.

June 25, 1974

APPENDIX A

2918

UNITED STATES of America, Plaintiff-Appellee,

v.

Clarence Olin "Head" REVEL, Defendant-Appellant.

No. 73–2261.

United States Court of Appeals,
Fifth Circuit.

April 24, 1974.

Defendant was convicted before the United States District Court for the Middle District of Alabama, Robert E. Varner, J., of violating statute prohibiting participation in an illegal gambling business and of conspiracy to violate the statute and he appealed. The Court of Appeals, Lewis R. Morgan, Circuit Judge, held that fact that violation of statute required participation by five or more people did not preclude conviction of conspiracy in addition to conviction of the substantive offense, and that fact that state statute of limitations had expired before date of indictment did not preclude conviction.

Affirmed.

See also D.C., 362 F.Supp. 448.

1. Conspiracy ⇐28(3)

Fact that violation of statute prohibiting participation in an illegal gambling business required participation by five or more people did not preclude conviction of conspiracy to violate the statute in addition to conviction for violation of the statute itself on theory that conspiracy was a necessary element of the substantive offense. 18 U.S.C.A. § 1955.

2. Criminal Law ⇐16

Facts that violation of state law was element of federal offense of participating in an illegal gambling business and that state statute of limitations for crime alleged in indictment charging defendant with the federal offense had expired before date of indictment did not preclude conviction of the federal offense. 18 U.S.C.A. § 1955; Code of Ala., Tit. 14, §§ 261, 278; Tit. 15, § 222.

Appeal from the United States District Court for the Middle District of Alabama.

Before DYER, MORGAN and RONEY, Circuit Judges.

LEWIS R. MORGAN, Circuit Judge:

Defendant-appellant Revel and 12 others were indicted in the Middle District of Alabama in a two-count indictment charging a violation of 18 U.S.C. § 1955[1] and a conspiracy to violate the same statute. After a jury trial, Revel was found guilty on both counts, and sentenced to imprisonment for four years. We affirm the conviction.

1. 18 U.S.C. § 1955 provides, in part:

(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

(b) As used in this section—

(1) "illegal gambling business" means a gambling business which—

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day. * * *

[1] Appellant's first contention is that charging him with a violation of § 1955 and conspiracy to violate § 1955 violates Wharton's Rule. The rule states:

> An agreement by two persons to commit a particular crime cannot be prosecuted as a conspiracy when the crime is of such a nature as to necessarily require the participation of two persons for its commission. 1 Anderson, Wharton's Criminal Law and Procedure, 1957, § 89.

Appellant argues that since a violation of § 1955 requires a gambling business participated in by five or more people, conspiracy is a necessary element of the crime itself, and therefore under the rule, a person may not be charged with both the substantive offense and conspiracy to commit the substantive offense. This contention has only recently been rejected by this court, and we reject it again in this case. United States v. Pacheco, 489 F.2d 554 (5th Cir. 1974).

[2] Next, appellant argues as follows: A violation of state law is an element of the offense under § 1955. The Alabama statute of limitations for the crime alleged in the indictment expired before the date of the indictment. Therefore, no violation of state law existed at the time of the indictment, and because there was no state law violation, there could not have been a federal law violation.

The factual bases of this allegation are all correct. The substantive violation alleged in the indictment was violation of Title 14, Sections 261 and 278, Code of Alabama 1940, Recompiled 1958. These violations are misdemeanors, and are governed by the 12-month statute of limitations in Title 15, Section 222, Code of Alabama 1940, Recompiled 1958. Neither count of the indictment alleges any overt act or agreement to act later than November 25, 1971, so the statute of limitations expired November 25, 1972. The indictment was filed March 13, 1973.

Appellant correctly emphasizes the importance of statutes of limitations in the criminal law, and the strictness with

which the government must comply with them. Nevertheless, the question in this case is one of a choice between federal and state law. We agree with appellant that Congress *could have* incorporated the state statutes of limitation into § 1955, as it has done in other instances. But the question is not whether Congress could have incorporated the state statutes, but whether it did so. We feel that it did not.

The gravamen of the indictment is that appellant violated federal law. Cf., United States v. Nardello, 393 U.S. 286, 89 S.Ct. 534, 21 L.Ed.2d 487 (1969). Just as in 18 U.S.C. § 1952,[2] the so-called Travel Act, the reference to state law in the federal statute is for the purpose of defining the *conduct* prohibited and for the purpose of supplementing, rather than pre-empting, state gambling laws. United States v. Karigiannis, 430 F.2d 148 (7th Cir. 1970), cert. denied sub nom., Panagiotopoulos v. United States, 400 U.S. 904, 91 S.Ct. 143, 27 L.Ed.2d 141 (1970). United States v. Rizzo, 418 F.2d 71 (7th Cir. 1969), cert. denied sub nom., Tornabene v. United

2. 18 U.S.C. § 1952 provides, in part:

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity.

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics or controlled substances (as defined in section 102(6) of the Controlled Substances Act), or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

* * * * * * * * * *

States, 397 U.S. 967, 90 S.Ct. 1006, 25 L.Ed.2d 260 (1970). See P.L. 91–452, 84 Stat. 922, Title VIII, § 811 and 1970 U.S.Cong. and Admin.News, 4032. Cf. United States v. Thaggard, 477 F.2d 626 (5th Cir. 1973).

Certainly Congress could have incorporated state statutes of limitations into the federal statute, but we cannot perceive any indication that it has done so, either in the pre-existing federal racketeering statutes, Chapter 95 of Title 18, United States Code, or in the Organized Crime Control Act of 1970, P.L. 91–452, 84 Stat. 922, which added § 1955 to Title 18. To the contrary, Congress, in passing the 1970 act, emphasized the federal interest in dealing with organized crime because of the influence of organized criminal activities on the economy, security and general welfare of the entire country. Congress excluded local, transitory gambling activities from the scope of the law, leaving their regulation to state and local authorities, but it asserted federal jurisdiction over racketeering and large-scale gambling activities. In view of this bifurcated system of enforcement, it seems reasonable to use federal standards in enforcing the federal law. This is proper for § 1955, just as it is for § 1952. United States v. Cerone, 452 F.2d 274 (7th Cir. 1971), cert. denied, 405 U.S. 964, 92 S.Ct. 1168, 31 L.Ed.2d 240 (1972).

We have examined appellant's other contentions of error and find them to be without merit.

Affirmed.

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

OFFICE OF THE CLERK

EDWARD W. WADSWORTH
Clerk

600 CAMP STREET
NEW ORLEANS, LA. 70130

TO ALL COUNSEL OF RECORD

Re: No. 73-2261 – U.S.A. v. Revel

Gentlemen:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH
CLERK

By Susan B. LeBrun
Deputy Clerk

cc: Mr. Ernest C. Hornsby
Mr. M. H. Myerson
Messers. Ira DeMent
David B. Byrne, Jr.
D. Broward Segrest

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 73-2261

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CLARENCE OLIN "HEAD" REVEL,

Defendant-Appellant.

Appeal from the United States District Court for the
Middle District of Arkansas

ORDER:

IT IS ORDERED that the motion of appellant filed in the above styled and numbered cause for a stay of the issuance of the mandate pending his petition for writ of certiorari in this cause be, and the same is hereby DENIED. See Fifth Circuit Local Rule 15, as amended January 11, 1972.

/s/ David W. Dyer

UNITED STATES CIRCUIT JUDGE

18 USCA 371

§371. Conspiracy to commit offense or to defraud United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for each misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

18 USCA 1955

§ 1955. Prohibition of illegal gambling businesses

(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

(b) As used in this section –

(1) "illegal gambling business" means a gambling business which –

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days

or has a gross revenue of $2,000 in any single day.

(2) "gambling" includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(c) If five or more persons conduct, finance, manage, supervise, direct, or own all or part of a gambling business and such business operates for two or more successive days, then, for the purpose of obtaining warrants for arrests, interceptions, and other searches and seizures, probable cause that the business receives gross revenue in excess of $2,000 in any single day shall be deemed to have been established.

(d) Any property, including money, used in violation of the provisions of this section may be seized and forfeited to the United States. All provisions of law relating to the seizure, summary, and judicial forfeiture procedures, and condemnation of vessels, vehicles, merchandise, and baggage for violation of the customs laws; the disposition of such vessels, vehicles, merchandise, and baggage or the proceeds from such sale; the remission or mitigation of such forfeitures; and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to seizures and forfeitures incurred or alleged to have been incurred under the provisions of this section, insofar as applicable and not inconsistent with such provisions. Such duties as are imposed upon the collector of customs or any other person in respect to the seizure and forfeiture of vessels, vehicles,

merchandise, and baggage under the customs laws shall be performed with respect to seizures and forfeitures of property used or intended for use in violation of this section by such officers, agents, or other persons as may be designated for that purpose by the Attorney General.

(e) This section shall not apply to any bingo game, lottery, or similar game of chance conducted by an organization exempt from tax under paragraph (3) of subsection (c) of section 501 of the Internal Revenue Code of 1954, as amended, if no part of the gross receipts derived from such activity inures to the benefit of any private shareholder, member, or employee of such organization except as compensation for actual expenses incurred by him in the conduct of such activity.

Added Pub.L. 91-452, Title VIII, §303(a), Oct. 15, 1970, 84 Stat. 937.

Title 14, Section 261, Code of Alabama 1940, Recompiled 1958.

§278. (4250) (7000) (4810) Selling pools, or making or taking a wager upon any prize fight, drill, baseball, or other contest. – Any person who, either as a principal or agent, sells any pool ticket, chance or other device, or makes or takes any wager, or enters into any transaction whereby money or other valuable thing may be won or lost upon any prize fight, drill, baseball game, or other contest, shall, upon conviction, be fined not less than twenty-five nor more than five hundred dollars for the first offense; and upon a second conviction, shall be sentenced to imprisonment in the county jail, or to hard labor for the county for thirty days; and upon each further conviction, shall be sentenced to sixty days hard labor for the county. (1919, p. 1112.)

Title 14, Section 278, Code of Alabama 1940, Recompiled 1958.

§261. (4279) (7004) Carrying on business of book-making or pool-selling. – Any person or corporation who shall carry on or conduct the practices commonly known as book-making or pool-selling, or either of them, or for betting upon the event of any horse race, or other race or contest, either within or without this state, shall be guilty of a misdemeanor, and shall, on conviction, be punished by a fine of not less than one hundred nor more than five hundred dollars, and by imprisonment in the county jail for not less than one month nor more than one year.

VOLUNTARY AFFIDAVIT

State of Georgia
County of Muscogee

Before me the undersigned Notary Public did personally appear Jerry Evans who is known to me and who after by me being duly sworn to speak the truth did depose and say as follows:

My name is Jerry T. Evans and my address is No. 23 Woodland Circle, Columbua, Georgia. I am employed by West Point Pepperell Mfg. Co. This is a voluntary statement given by me to Attorney Earnest C. Hornsby at my request. I know and understand that I do not have to make any statement at all to him and I further know that any statement I make to him can be and will be used in court against me. I understand that I have a right to have my lawyer present before answering any of Attorney Hornsby's questions. I make this statement voluntarily to satisfy my own conscience and to set the records straight. I testified in a criminal case styled United States VS Clarence Olin "Head" Revel in the Spring of 1973 in Opelika as a Government witness. I am dissatisfied with my testimony in the case because certain parts of it are untrue and misleading. I am making this voluntary statement now to Attorney Ernest C. Hornsby because I feel that my testimony was material in the conviction of Mr. Revel and parts of my testimony was untrue. No one in the world has threatened, pressured, or coerced me into making this statement and no one has paid me anything or offered to pay me anything or given me any reason to believe or hope that anyone will pay me anything of value whatsoever growing out of my giving this truthful statement.

The portion of my testimony wherein I said that Mr. Revel was present in the Lounge of the Phenix City Holiday Inn where the football parlay operation was discussed between Bobby Smith, Sonny Buts, Mark Chesser and myself is misleading and untrue. Mr. Revel has never been present when the football parlay operation was discussed in my presence. Specifically, Mr. Revel was not present on any occasion in the Fall of 1971, at the Phenix City Holiday Inn Lounge when the football parlay operation was discussed in my presence by anymore. I have never heard Mr. Revel discuss the football parlay operation in 1971 and I have never heard anyone at any time or place whatsoever discuss gambling, including the parlay operation, in Mr. Revel's presence.

The first time I ever met Mr. Revel was at Mark Chesser's Realty Office on Victory Drive.

The next time I ever saw Mr. Revel was on the outside of the Phenix City Holiday Inn standing on the sidewalk. I may have seen him once on the inside of the Lobby or Lounge of the Phenix City Holiday Inn. I don't remember. I went to the Phenix City Holiday Inn Lounge daily during the Fall of 1971 and the two above times are the only times I ever saw Mr. Revel. I never have had any conversation with him and I never overheard a conversation between him and anyone respecting the parlay operation.

At the time of the Trial of Mr. Revel I was under tremendous pressure because I was on the docket for trial myself. I was scared. Mr. Jim Young has mentioned to me that since I had been an undercover agent that I could be harmed or killed in prison by other inmates. On another occasion Mr. Jack Smythe had alluded to the danger that I was in at the time. My Lawyer,

Charles Floyd, had told me that I could be killed in the prison by other inmates who hated police informers, or undercover agents. U.S. Attorney Broward Segrest told me, while referring to Bobby Chesser who was making a statement to the Government; "That son of a bitch is putting it to you. He is telling us you are more involved than you led us to believe." After telling me that he grabbed me by the shoulder of my coat and said "If you tell anything I've said you might not live to get back to Columbus. I'll kill you." He then grinned. I didn't know what he meant and still don't. I was very confused and scared when I took the stand in Mr. Revel's case. The fact that I had lost my job with the City of Columbus had also been very upsetting to me as had the outcome of my case.

I honestly don't know why I said that Mr. Revel was present in the Phenix City Holiday Inn Lounge when the parlay was discussed. He was not present and I feel that this erroneous information from me may have influenced the jury in convicting him.

/s/ Jerry T. Evans

Jerry T. Evans

WITNESS

/s/ Darlene C. Green

Sworn to and subscribed before me this 27th day of January, 1974

****/s/ Darlene C. Green

Notary Public

SEAL

My Commission Expires * Feb. 11, 1976

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	C.R. No. 2685-E
CLARENCE OLIN "HEAD" REVEL, Defendant.	)	

ORDER

This cause is now submitted to the Court on the Defendant's motion for new trial filed herein June 19, 1974, and based upon allegedly false testimony at that trial which was allegedly not discovered by the Defendant and his attorney until January 27, 1974. The Defendant further requests this Court to enter an order setting aside the Court's order of commitment dated June 17, 1974, as amended on June 19, 1974, and continuing the Defendant's commitment to prison until such time as a hearing on the merits of said motion for new trial can be heard.

As grounds for his motion, the Defendant attaches the affidavits of three persons, one of whom, Jerry T. Evans, was a government witness in the trial in May, 1973, in Opelika, Alabama, wherein the United States was prosecuting Defendant. In said affidavit, Evans now acknowledges that he perjured himself at the trial.

At the trial, Evans testified that Defendant Revel was present in the lounge of the Phenix City Holiday Inn

where a football parlay operation was being discussed between Bobby Smith, Sonny Butts, Mark Chesser, a co-defendant, and Evans himself. Mr. Evans now reverses his testimony by stating in his affidavit that:

> "Mr. Revel has never been present when the football parlay operation was discussed in my presence. Specifically Mr. Revel was not present on any occasion in the Fall of 1971, at the Phenix City Holiday Inn Lounge when the football parlay operation was discussed in my presence by anymore [sic]. I have never heard Mr. Revel discuss the football parlay operation in 1971 and I have never heard anyone at any time or place whatsoever discuss gambling, including the parlay operation, in Mr. Revel's presence."

In addition to Mr. Evans' affidavit, the Defendant attaches the affidavits of Mark Chesser and Sonny Butts, both of whom categorically and emphatically deny that they have ever been present at a table in the lounge of the Holiday Inn in Phenix City, Alabama, where Jerry T. Evans, Mark Chesser, Bobby Smith, Raymond Whitehead and the Defendant, Clarence Olin "Head" Revel, were present and where any type of betting was discussed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Ordinarily, a District Court may, in its discretion, determine a motion for new trial based upon affidavits without more. *Ewing v. United States,* 135 F.2d 633; *Lyles v. United States,* 272 F.2d 910 (5th Cir. 1959). However, there are exceptional cases in which an oral hearing should be granted. *Remmer v. United States,* 347 U.S. 227; *Ryan v. United States,* 191 F.2d 779.

In the *Lyles* case, supra, Judge Rives found such exceptional circumstances to exist when he stated:

> "In this case, each of the parties requested an oral hearing, and evidently thought such a hearing advisable if not absolutely necessary. Under all of the facts and circumstances of the case, including the requests of the parties, we think that the district court certainly, and perhaps this Court also, will be in a better position to exercise its functions if the evidence is fully developed upon a hearing."

The case before this Court is different from the *Lyles* case, supra, in two aspects: First, in this case, only the Defendant has requested a hearing; the government has made no such motion. Secondly, this Court feels that, under all of the facts and circumstances in the case at bar, a just determination can be made without a hearing.

The Defendant contends that he first discovered the allegedly false testimony of Mr. Evans on January 27, 1974. However, the Defendant was present at his trial, heard the testimony of Evans, and, if, in fact, no such conference took place at the Phenix City Holiday Inn, said Defendant certainly must have known that neither he nor these witnesses were present at the conference, and yet Defendant offered no evidence at the trial that said conference did not take place. Thus, it cannot be said that the Defendant Revel was surprised at the testimony given at the trial by the witness Evans. If the Defendant was surprised by testimony of a co-defendant, he should have interposed an objection and claimed a mistrial or sought a continuance to produce evidence from others said to have been present. Having passed it by and gambled for and lost the verdict, it is too late to allege surprise as a ground for a new trial. *United States v. Noble,* 294 F. 689, aff'd. 300 F. 689. The same principle applies where a defendant is taken by surprise by testimony introduced by other witnesses rather than a co-defendant. *Bates v. United States,* 269 F. 563.

In *United States v. Johnson,* 149 F.2d 31, reversed on other grounds 327 U.S. 106, 66 S.Ct. 464, 90 L.Ed. 562, reh.den. 327 U.S. 817, 66 S.Ct. 699, 90 L.Ed. 1040, and in *United States v. Hiss,* 107 F.Supp. 128, affm'd. 201 F.2d 372, cert.den. 345 U.S. 942, 73 S.Ct. 830, 97 L.Ed. 1368, the Courts held that a new trial should be granted when the Court is reasonably well satisfied that testimony given by a material witness is false, that without it the jury might have reached a different conclusion, and that a party seeking a new trial was taken by surprise when false testimony was given and was unable to meet it or did not know of its falsity until after trial.

This Court is of the opinion that the verdict would not have been different even if Evans had not testified. The testimony of other witnesses was strong enough to convince the jury of Revel's guilt with or without Evans' testimony. The Court in *United States v. Randaccio,* 440 F.2d 1337, held that, for a new trial to be granted on the ground of newly-discovered evidence, the evidence must have been discovered since the trial, it must be material to factual issues at trial and not merely cumulative, and it must be of such a nature that it would probably produce a different verdict in the event of a retrial.

One of the witnesses testified that, on one occasion, he visited Revel's home in Phenix City for the express purpose of picking up cash that was to be used in the illegal gambling operation. While the furnishing of money in Alabama by the Defendant would probably not alone be sufficient evidence to establish Defendant's guilt, that evidence, taken with evidence of what the Defendant did in Georgia, would have been enough to convince the jury beyond a reasonable doubt of the Defendant's guilt.

In regard to the affidavit attached by Mark Chesser, wherein he denies being present at the Holiday Inn

Lounge where the Defendant and other witnesses discussed football parlays, it is important to recognize that Chesser was present at the trial of Defendant, was available and could have been used by the Defendant in his defense at that time. Subsequent to Evans' testimony at trial, the defense made no attempt to seek a delay to confirm what Evans had stated. They accepted the testimony as it was given at that time, made no attempt to deny it, and, in this Court's opinion, may not go into it now. *United States v. Noble*, supra.

In conclusion, this Court can find nothing that would warrant the granting of a new trial for the Defendant. Accordingly, it is the

ORDER, JUDGMENT and DECREE of this Court that the Defendant's motion for a new trial filed herein June 19, 1974, be, and the same is hereby, denied. It is further

ORDERED that this Court's previous order of commitment dated June 17, 1974, as amended on June 19, 1974, shall remain in full force and effect.

DONE this 20th day of June, 1974.

/s/ R.E. Varner
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	C.R. NO. 2685-E
CLARENCE OLIN "HEAD" REVEL, Defendant.	)	

AMENDED ORDER

It is hereby ORDERED that this Court's order of June 17, 1974, be, and the same is hereby, amended as follows:

It is ORDERED that Clarence Olin "Head" Revel stand committed for the service of said sentence on or before 12:00 o'clock noon Friday, June 21, 1974, and that the said Clarence Olin "Head" Revel surrender himself to the United States Marshal at his office in the Federal Courthouse in the City of Atlanta, Georgia, on said date for the purpose of commencing the service of said sentence. It is further

ORDERED that three copies of this order be certified and delivered to the United States Marshal in Atlanta, Georgia.

DONE this 19th day of June, 1974.

R.E. Varner
United States District Judge

I, Ernest C. Hornsby, certify that I have received a copy of this Amended Order on behalf of my client, Clarence Olin "Head" Revel, on this the 19th day of June, 1974.

/s/ Ernest C. Hornsby

Ernest C. Hornsby
Attorney for Clarence Olin
"Head" Revel

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1951

CLARENCE OLIN "HEAD" REVEL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

After a jury trial in the United States District Court for the Middle District of Alabama, petitioner was convicted on one count charging substantive violations of 18 U.S.C. 1955 (conducting, financing, managing, directing or owning all or part of an illegal gambling business) and one count of conspiracy to violate the same statute. He was given a general sentence of four years' imprisonment, subject to the early parole eligibility provisions of 18 U.S.C. 4208 (a)(2). The court of appeals affirmed (Pet. App. A, pp. 1a-5a; 493 F.2d 1).

The government's evidence showed that in the Fall of 1971, a mobile trailer located in Columbus, Georgia, was placed under surveillance by local authorities because it was suspected of being the center of a foot-

ball gambling operation (Tr. 18–19). Further investigation revealed that the operation received "line" information with respect to upcoming football contests through telephone contacts in Las Vegas, Nevada (Tr. 310–320).[1] These telephone calls from Nevada were placed to certain numbers in both Columbus, Georgia, and Phoenix City, Alabama. The mobile trailer in Columbus was used primarily to collect money and to tally up parlay sheets, which were distributed in both Columbus and Phoenix City (Tr. 99–100, 190).

Petitioner's participation in the gambling enterprise was thoroughly demonstrated. Witnesses Benny Knox, Mickey Coy Kite, Richard Wayne Evans, Bobby Joe Lee, Bobby Chesser, and William Chesser, all of whom had participated in the gambling business, each testified that petitioner was frequently present in the trailer when the parlay sheets were being tallied up (Tr. 182–183, 194, 215, 234–235, 382, 426–427, 429). William Chesser testified that on one occasion, after the sheets had been tallied, Bobby Smith gave petitioner the money that had been received in connection with the bets, and petitioner left the trailer with the bag of money (Tr. 425–427). Lee indicated that once he had driven to petitioner's home in Phoenix City, Alabama, in order to pick up a quantity of money to be used to pay off winning bets (Tr. 239–242). Lee also stated that on another occasion, when the tally came up short, petitioner ordered those involved

[1] There was testimony that "line" information is "the odds given on a particular football game" (Tr. 312).

to "* * * get in there and straighten that mess out * * *" (Tr. 243). Bobby Chesser testified that when one of the members of the gambling operation had had to use some personal funds to pay off certain winning bets, he stated to others in the group, including petitioner, that "you all owe me so much money. This is my personal money" (Tr. 382).[2]

1. Petitioner argues that "Wharton's Rule" precludes conviction and punishment for a substantive violation of 18 U.S.C. 1955 and for a conspiracy to commit that offense. As petitioner points out, that issue is presented in *Iannelli* v. *United States*, No. 73-64, certiorari granted May 28, 1974. The Court may wish, therefore, to defer disposition of the present petition with respect to this issue until after the decision in *Iannelli*, and then to dispose of it in accordance with that decision.

2. Petitioner contends that because the illegal gambling business he was charged with conducting is de-

[2] Appended to the petition is an affidavit (Pet. App. A, pp. 12a–14a) by one of the government's witnesses, Jerry T. Evans, in which Evans recants portions of his prior trial testimony. However, this matter is not properly before the Court. Petitioner unsuccessfully moved in the district court for a new trial (Pet. App. A, pp. 15a–19a), and the district court's denial of this motion has not yet been resolved by the court of appeals. See *United States* v. *Revel*, No. 74-2776 (C.A. 5). In any event, as our statement of the facts indicates and as the district court found, "the verdict would not have been different even if Evans had not testified. The testimony of other witnesses was strong enough to convince the jury of Revel's guilt with or without Evans' testimony" (Pet. App. A, p. 18a). In compiling our statement of the facts for this memorandum, no reliance was placed on the testimony of Jerry Evans.

fined in Section 1955 as one that violates state law, he was improperly convicted because the Alabama statute of limitations had run upon the state offense that was the basis of the federal charge. We submit, however, that the court of appeals correctly concluded that the reference to state law in Section 1955 is only for the purpose of defining the *conduct* prohibited and was not intended to incorporate the entire state statutory scheme. "The gravamen of the indictment is that [petitioner] violated federal law"; the purpose of the federal statute is to supplement, rather than pre-empt, state gambling laws (Pet. App. A, p. 4a). Reference to state law is necessary only to identify the type of unlawful activity. As the court of appeals stated (*id.* at 5a):

> Certainly Congress could have incorporated state statutes of limitations into the federal statute, but we cannot perceive any indication that it has done so * * * To the contrary, Congress, in passing the 1970 act, emphasized the federal interest in dealing with organized crime because of the influence of organized criminal activities on the economy, security and general welfare of the entire country. Congress excluded local, transitory gambling activities from the scope of the law, leaving their regulation to state and local authorities, but it asserted federal jurisdiction over racketeering and large-scale gambling activities. In view of this bifurcated system of enforcement, it seems reasonable to use federal standards in enforcing the federal law. * * *

The "federal standards" in regard to statutes of limitations are found in 18 U.S.C. 3282, which provides

a five-year statute of limitations for non-capital federal offenses, "[e]xcept as otherwise expressly provided by law." There is no other provision applying to 18 U.S.C. 1955. By analogy, 18 U.S.C. 1952, which prohibits the use of interstate commerce with intent to facilitate an illegal activity and defines illegal activity in part as one that violates state law, has been similarly interpreted as not incorporating local statutes of limitation. See *United States* v. *Cerone*, 452 F.2d 274, 286–287 (C.A. 7), certiorari denied, 405 U.S. 964.

3. Without citation in the record to such comments, petitioner further argues that the United States Attorney made nine improper comments as to petitioner's failure to testify. A review of the United States Attorney's closing arguments (Tr. 515–528), however, reveals that his remarks to the jury were directed only to reminding them that there was no substantial defense evidence to support defense counsel's contention that petitioner's proximity to the gambling activity was due solely to his interest in collegiate athletics. See, *e.g.*, Tr. 525. These comments were directed not to petitioner's failure to testify himself but to the insufficiency of the defense evidence in general to support counsel's theory of defense.

4. Petitioner's final two contentions, concerning the trial court's jury instructions and the sufficiency of the evidence, are equally without merit. It is argued the court's instruction that "* * * Mr. Revel can have done this by himself * * *" (Pet. 12; Tr. 591) was inaccurate as a matter of law because 18 U.S.C.

1955 requires that the prohibited gambling business involve five or more persons. It is, however, axiomatic that instructions to a jury must be considered as a whole and that a challenge to jury instructions will not succeed if based upon a portion of the charge taken out of context. See, *e.g.*, *Carter* v. *United States*, 427 F. 2d 619, 625 (C.A.D.C.). In the portion of the instruction quoted by petitioner, the trial court was merely distinguishing between the conspiracy count and the substantive count and did not purport to suggest that five persons did not need to be involved before a violation of Section 1955 was established. Indeed, immediately after the instruction referred to, the trial court reiterated that there "must be five or more people involved" (Tr. 592). Moreover, so far as appears from the record, there was no objection in the trial court as required by Rule 30 of the Federal Rules of Criminal Procedure to the portion of the instructions complained of here.

Finally, petitioner argues that it was error for the trial court not to instruct the jury that, in order to support a guilty verdict against petitioner upon the substantive charge, he must be found to have perpetrated some "affirmative act" within the Middle District of Alabama, the district in which the trial occurred.[3] This position is incorrect. Petitioner is deemed to have committed an offense in the Middle District of Alabama if a person whom he aided and abetted had committed an act there, and the trial

[3] Rule 18 of the Federal Rules of Criminal Procedure provides that a prosecution shall be pursued in the district in which the offense was committed.

court gave the traditional aiding and abetting instruction (Tr. 564). Moreover, the evidence adduced at trial revealed that petitioner's participation in the gambling business extended to Phoenix City, Alabama, as well as Columbus, Georgia. See, *e.g.*, Tr. 99–100, 190, 239–242.

It is therefore respectfully suggested that the Court defer disposition of this case until after its decision in *Iannelli*, and that in all other respects the petition should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1974.

U.S. GOVERNMENT PRINTING OFFICE: 1974